

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. 15,100

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Appeal of)

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INTRODUCTION

The petitioner appeals a decision by the Department of Social Welfare to terminate her ANFC grant because her husband is not absent from the home and her children are, therefore, not deprived of parental support.

FINDINGS OF FACT

1. The petitioner is the mother of three teenage children who live with her in a home owned by her and her husband which is located on a remote rural road. The petitioner claims to have separated from her husband in 1993, but neither party has taken any steps to dissolve the marriage or to divide their property in the four intervening years. The petitioner says this is because she can't afford a divorce, although she has never made inquiries of the court about the fees or attempted to get any free legal help.
2. The petitioner's husband does not have a separate residence from her although he claims that he lived at his place of employment, an auto repair garage, for a brief period of time when they first separated. He did receive his mail at a separate post office box for a while but now the petitioner gets it and holds it for him. The husband describes his home as his eighteen wheel tractor trailer rig which he drives throughout the country over ninety per cent of the time, usually working ten hour days, seven days per week. He also did this kind of work for a time before 1993, the year of the claimed separation. After working at a garage as a mechanic for a short time in 1993 and 1994, the petitioner's husband went into business with his brother, bought his own truck and resumed long distance trucking work.
3. The petitioner has been receiving \$546 per month in ANFC payments. The Court has established a child support obligation of \$669 per month for the petitioner's husband. However, the Office of Child Support Services has had a difficult time collecting the money because it cannot get personal service on the petitioner's husband. The only physical residence that the sheriff has been able to connect the petitioner's husband to is the petitioner's home. Records of the family court and Office of Child Support show that the court has had difficulty gaining the cooperation of the petitioner in collecting child support. She has had to be placed under subpoena to attend her own support hearings subject to her arrest and the court suspects that the petitioner may be assisting her husband in evading sheriff's service. She has been sanctioned by DSW for non-cooperation with collection of support. The husband is currently behind in his child support payments and refuses to pay because he thinks the action to

establish the support was "illegal."

4. On at least one visit by OCS employees to the petitioner's home, the husband's truck was observed at her residence but the petitioner denied knowing his whereabouts. During a visit by a DSW fraud unit employee, the petitioner was observed returning to her home in the truck with her husband driving at which time she offered that they had been off visiting her husband's father in Massachusetts. The petitioner agrees that her husband spends up to thirty days per year at her home over a period of four or five visits which are usually unannounced. She claims that he stays at her home solely to visit with her children and that he sleeps on the couch or in his truck (which has sleeping facilities) when he does so. He parks the truck on the land near the house which they both own. He calls his children a few times per week but she makes most of the decisions about the children because he is not around very often. When he is at her home, her husband sometimes gives the children money or makes decisions about their welfare. Most recently he bought them a satellite dish and paid the taxes on the house to avoid an "auction."

5. The separation of the petitioner and her husband is supported by virtually no evidence in the record other than the petitioner's assertion that it has occurred. That assertion is questionable in light of the facts which show that her husband has had no other residence since he allegedly left, that the petitioner and her husband have taken no steps to legally separate even though more than four years have passed, that they continue to own their home together, that the petitioner spends virtually all of his out of work days (by his estimate about thirty-six per year) at the petitioner's home and, finally, that they have both actively thwarted attempts, perhaps in concert, by the Office of Child Support to collect child support for the children.

6. Neither can it be concluded from the above evidence that the petitioner's children are deprived of maintenance, physical care or guidance because of the informal separation of the parties. The petitioner's husband continues to play a financial role in the children's life, as well as offering some guidance and support. To the extent that the children have been deprived of any of these functions, the deprivation appears to be a result of the nature of his work which takes him far away from his home for long periods of time, and not the result of any

separation of the parents. This same kind of deprivation presumably occurred before the alleged separation when the husband was also driving a truck long distance. The petitioner presented no evidence that the current level of maintenance, physical care or guidance is any different now than it was before the alleged separation.

ORDER

The decision of the Department to terminate the petitioner's ANFC grant is upheld.

REASONS

Under the Department's regulations:

Eligibility for ANFC requires establishing that a child is deprived of parental support or care for one of the following reasons and that the income and resources available to the parent in custody of the child and the child are insufficient to meet the child's needs according to Department standards:

...

2. Continued absence of a parent:

W.A.M. 2330

The regulations further define the last concept as

follows:

Continued absence of a parent refers to physical absence of a parent from the home for one of the following reasons, the nature of which interrupts or terminated the parent's functioning as a provider of maintenance, physical care or guidance for the child:

...

3. Informal separation of parents without benefit of legal action.

W.A.M. 2331

(emphasis supplied)

The Board has held that it is the Department's burden to show in an ANFC termination case that the parent is not "physically absent" from the home. The regulations make it clear that the physical absence must be due to the informal separation of the parents, and not because of his employment. In this matter, the father of the children is physically absent from the petitioner's home some ninety per cent of the time. However, that absence is because of the kind of work that he has chosen, and not because of the separation of the parents. The evidence does show, based on the petitioner's admission, that almost every day he is not on the road is spent at their home. Even if his relationship with the petitioner has actually changed, it is difficult to see how that change has caused any difference in the amount of time he spends at their home. Given these facts, and the additional damaging fact that he has never established another residence during the last four years and now receives his mail at her home, it must be found that the Department has shown that the petitioner continues to live in the petitioner's home and the petitioner's assertion that he doesn't live there is a sham or a contrivance.

The Board has held that in cases where the parties claimed separation is a contrivance or questionable, the burden shifts to the petitioner to show that the children have been deprived of maintenance, physical care or guidance by the alleged absence of the father. See Fair Hearings No. 6,877 and 11,538. The petitioner put on little evidence in this regard. The evidence which she did put on shows that she is the principal decision maker, custodian, and guider of her children. However, she did not present any evidence that this is a different situation than before the separation when her husband was also a long-distance truck driver. There was no evidence offered that his involvement with the children is even less now that it was before they separated and he was doing the same work. On the contrary, there is considerable reason to find that the petitioner does still maintain his children (paying the taxes on the house, providing a satellite dish) and has regular weekly contact with them in spite of the demands of his job. The petitioner has presented little or no evidence that her separation from her husband, as opposed to his employment, has caused a diminution in the petitioner's functioning as the father of his children to

a degree significantly less than when he admittedly lived in their household.

Nothing in this opinion should be interpreted as preventing the petitioner's husband from visiting his children, even if it means that he spends every day he is not on the road with them. If that were the only factor weighing against the petitioner in this matter, it would likely have not been sufficient to show a lack of deprivation. If the petitioner and her husband have truly separated, it would behoove her husband to get his own residence where he can care for his needs when he is off duty and visit with his children. While the petitioner is not required to initiate a divorce to be eligible for ANFC, her assertion that she has only failed to take this action for financial reasons would have enhanced credibility if she had actually looked into the requirements of the process or the possibility of obtaining a free attorney or advocate. Finally, if the petitioner has genuinely separated from her husband, she should show her willingness to collect child support from him on behalf of her children and not drag her heels in court, an action which makes it appear that she is conspiring with her husband to avoid reimbursing the Department for its support of her children.

As the Department has presented ample evidence casting doubt upon the genuineness of the parties' separation and the petitioner has failed to meet that evidence with a showing that her children have experienced a diminution in maintenance and care by the father due to the separation, it must be concluded that the father is not an "absent parent" and the Department's decision to terminate the grant based on categorical ineligibility must be upheld.

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